84-1521

NO.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

JOHN HENRY HENDRICKS,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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21 pp

QUESTIONS PRESENTED FOR REVIEW

1. Can a mail fraud conviction be sustained on the allegation that a complainant who never appeared at trial was misled and defrauded?

2. Did the Court of Appeals for the Fifth Circuit err in holding that an insurance purchaser who does not read the insurance policy application at the time of purchase is a reasonably prudent complainant under the mail fraud statute 18 U.S.C. §1341?

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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Comes now the Petitioner John Henry Hendricks, and submits this, his Petition for Writ of Certiorari in the above styled and numbered cause.

OPINION BELOW

The opinion of the Court of Appeals below was not reported. The opinion of the District Court below was not reported.

JURISDICTION

The judgment of the Court below was entered on March 23, 1984. Rehearing was not sought. The jurisdiction of this Court is invoked under 28 U.S.C. Sect. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The statute under which Petitioner was prosecuted, though nothing turns on its terms, was 18 U.S.C. 1341, which provided as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, of other article, or article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

COURSE OF PROCEEDINGS

INDICTMENT FOR 14 COUNTS OF MAIL FRAUD, EACH A FELONY VIOLATION OF 18 U.S.C. §1341
October 14, 1984

JURY SELECTED AND EMPANELLED
February 15, 1984

VERDICT OF GUILTY RETURNED
February 22, 1984

JUDGMENT AND COMMITMENT ORDER
COUNT 1 TWO YEARS AND $1,000 FINE
COUNT 6 ONE YEAR AND $1,000 FINE TO RUN CONSECUTIVE WITH COUNT 1
COUNT 11 TWO YEARS AND $1,000 FINE TO RUN CONCURRENT WITH COUNT 1
COUNT 14 TWO YEARS AND $1,000 FINE TO RUN CONCURRENT WITH COUNT 1
March 23, 1984

NOTICE OF APPEAL GIVEN
April 2, 1984

RECORD FILED
June 21, 1984

OPINION RENDERED
December 19, 1984

MOTION FOR REHEARING FILED
January 23, 1985

MOTION FOR REHEARING DENIED
January 23, 1985

MOTION FOR STAY OF MANDATE FILED
February 4, 1985

PETITION FOR CERTIORARI DUE
March 23, 1985

STATEMENT OF MATERIAL FACTS

The Federal Government produced nine witnesses who each testified that they bought an insurance policy from either the Appellant or his agent, Bobbie McNeil. Each of these witnesses was a postal worker who thought the Appellant was a representative of the local labor union—the National Alliance of Postal Workers. Many thought they were buying an Individual Retirement Account, a savings, or a retirement program. Each cancelled the policy after the Postal Inspector, Ingersoll, posted a notice saying the program was being investigated. Each of the witnesses signed an application for insurance form and a payroll deduction form, but none took the time to read what they were signing. The government stipulated that all reasonable people who read the application forms would know that they were purchasing insurance.

Although two government witnesses denied that Appellant was affiliated with the Union, other union and postal workers testified for the Government that Appellant was a duly authorized union representative.

Another government witness, a representative of the parent insurance company, testified that the policy sold was a good sound policy and that commissions on the sales were mailed to Appellant. These mailings apparently satisfy the "use of mail" requirement of the statute 18 U.S.C. §1341.

The Appellant and his co-defendant denied making any fraudulent misrepresentations and stated that their presentations had been approved by the parent company.

An insurance expert testified that the sales approach used was legal and that the policy sold was a good sound policy. He also testified that the policy sold was by definition a retirement program. Additionally, the defense produced several satisfied customers from the postal union.

The government voluntarily dismissed seven counts of the Indictment. After arguments, the Appellant was convicted of four counts of mail fraud. This appeal is taken therefrom.

SIGNIFICANCE OF QUESTIONS RAISED AND REASONS FOR ALLOWANCE OF WRIT

The issue of whether a complainant, who never testified at trial, can be shown to have been misled is one of first impression but the Fifth Circuit has decided these important questions of Federal law in conflict with general principles of confrontation.

In order to determine whether a sales presentation is "misleading" the presentation must be considered in the context of the complainant's subjective knowledge or intent. A more sophisticated buyer or one more knowledgable of insurance "jargon" is less likely to have been misled than a person of limited communication skills or intelligence. An insurance salesman will view a presentation differently as a buyer than a lay person.

In this case, Count 11 of the indictment. the complainant Jacqueline Swanson *never* appeared at trial. There is no first hard evidence of her perception and her understanding of the sales presentation. No one testified concerning any directly false statements made to her. She was one purchaser from an army of hundreds, most satisfied, some not. Reasonable minds can differ over whether she was misled in any fashion by the presentation since no complaint was heard from her lips. Although Appellant can find no case to control this scenario, the ruling is contrary to the Second Circuits holding in *United States v. Regent Office Supply,* 421 F.2d 1174 (2nd Cir. 1970).

The Court of Appeals did not address this issue in any fashion in its opinion as if to say "since others were defrauded she was too". That reasoning is not the appropriate standard. It begs the question of whether reasonable minds could differ over the nature of the transaction.

II.

The Fifth Circuits holding that whether or not the complainant's purchasers acted reasonably is an irrelevant issue, is directly contrary to the holding of the Second Circuit in *United States v. Regent Office Supply Co.,* 421 F.2d 1174 (2nd Cir. 1970).

Apparently there is a split among the circuits as to whether in order to sustain a conviction the evidence must establish that a person of ordinary prudence could be misled. The Second and Ninth Circuits have held, in *United States v. Regent Office Supply, supra* and *United States v. Louderman,* 576 F.2d 1383, 1388 (9th Cir.), *cert. denied,* 439 U.S. 896 (1978) respectively, that a showing of ordinary

prudence or the propensity to mislead a person of ordinary prudence is a prerequisite to conviction. The instant opinion relies heavily from language in *United States v. Brien*, 617 F.2d 199 (1st Cir.), *cert. denied*, 446 U.S. 919 (1980) to the effect that whether the person misled is bright or dull, gullible or skeptical is irrelevant.

In trial the government stipulated that any person who read the application would not have been misled. The complainants in this case did not read the applications. Therefore, Appellant contends they were not prudent or reasonable within the context of the mail fraud statute. But compare *United States v. Martin, 699 F.2d 588 (1st Cir. 1982).*

CONCLUSION

These issues should be addressed in order to clarify the burden of proof necessary to establish that a person of ordinary prudence was the victim of a mail fraud and in order to settle the conflict among the Circuits as to whether ordinary prudence must be established by the prosecution in a mail fraud case.

Respectfully submitted,

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ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I certify that three copies of the foregoing Petition for Writ of Certiorari have been served upon opposing counsel of record by placing the same properly addressed in the United States Mail with adequate postage affixed thereto this the 7TH day of March, 1985.

FRANK JACKSON

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-1310

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BOBBIE FAYE McNEIL and
JOHN HENRY HENDRICKS,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Texas

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(December 19, 1984)

Before CLARK, Chief Judge, GOLDBERG, and RUBIN, Circuit Judges.

PER CURIAM:*

Bobbie Faye McNeil and John Henry Hendricks were convicted on multiple counts of mail fraud. On appeal,

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

McNeil and Hendricks contend that the convictions were improper because the evidence was insufficient and because they committed no fraud. McNeil also contends that she did not use the mail. Rejecting these contentions, we affirm the convictions.

I.

When evaluating the sufficiency of the evidence, we must consider whether, in the view most favorable to the government, substantial evidence supports the jury's verdict. Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457, 469 (1942). Based on the evidence in the record, the jury reasonably could have found the following facts.

McNeil and Hendricks were licensed insurance agents. Each had contracts to sell life insurance on behalf of Old American Insurance Company. McNeil was Hendricks employee. Whenever Hendricks sold a policy, Old American mailed him a commission check. Whenever McNeil sold a policy, Old American mailed McNeil's commission check to Hendricks. Old American had on file an assignment by McNeil authorizing Hendricks to endorse her checks. Hendricks cashed McNeil's checks and then paid McNeil.

Both defendants sold life insurance policies to postal workers who thought they were purchasing individual retirement accounts, savings, or retirement programs. In one case, Hendricks led a postal worker to believe that the forms signed by the postal worker would enable him to discover how much money he had contributed to his Social Security account. To arrange meetings with prospective purchasers, McNeil and Hendricks represented themselves as postal employees or postal union representatives. None

of the purchasers read the application and payroll deduction forms they signed. After discovering that they had purchased life insurance, the postal workers cancelled the policies.

McNeil was charged with six counts of mail fraud. Hendricks was charged with eight. During trial, the court granted the government's motion to dismiss seven of the counts. The jury returned guilty verdicts against Hendricks on four counts and against McNeil on two counts. McNeil was acquitted on the remaining count.

II

To establish mail fraud under 18 U.S.C. § 1341, the government must prove the existence of a scheme to defraud, and use of the mail in order to further that scheme. United States v. Curry, 681 F.2d 406, 410 (5th Cir. 1982). Deliberate concealment of material facts is sufficient to establish a scheme to defraud if the concealment is meant to create a false representation. Blachly v. United States, 380 F.2d 665, 673-74 (5th Cir. 1967). On the basis of the facts and circumstances surrounding a transaction, an intent to defraud also may be inferred. United States v. Gaspard, 744 F.2d 438, 440 (5th Cir. 1984); United States v. O'Keefe, 722 F.2d 1175, 1181 (5th Cir. 1983). Viewed in the light most favorable to the government, we cannot say that the evidence was insufficient to satisfy the statutory requirements of mail fraud.

Witnesses testified that McNeil and Hendricks represented themselves as postal employees or postal union representatives. Post office and postal union officials testified that McNeil and Hendricks were neither. The testimony of purchasers established that both defendants

either actively misrepresented the insurance policies as individual retirement accounts or deliberately concealed the nature of their product. The defendants failed to deliver the policies to the purchasers and to leave with the purchasers any copies of the forms they had signed. Old American mailed commission checks to McNeil or Hendricks for each policy sold. The jury is entitled to weigh the evidence and evaluate the credibility of the witnesses. Based on the evidence, the jury could have reasonably concluded that the defendants' sales presentations were calculated to defraud prospective purchasers.

III

Even if a scheme to defraud did exist, McNeil contends that the evidence is insufficient to connect her to the sale of insurance to one of the postal workers, Juan Rodriguez. Rodriguez testified that McNeil was present, but participated minimally, during the presentation by Hendricks. He named McNeil, but failed to identify her in court. Rodriguez also testified that Hendricks represented himself as a postal employee, and that Hendricks led him to believe that he was purchasing an individual retirement account. The government produced Rodriguez's insurance application at trial. The application contains McNeil's signature in two places, and indicates that McNeil "personally secured the application." McNeil attacks her conviction on the Rodriguez count on three grounds: Rodriguez failed to identify her in court; her minimal participation was insufficient to constitute fraud; and the government failed to prove that the signatures on the insurance application were actually hers.

The record contains ample evidence of McNeil's participation with Hendricks in the scheme to defraud postal

workers. Witnesses testified that McNeil sold or attempted to sell the insurance policies. Several witnesses identified her in court. One witness, Lela Martin, identified McNeil, but implied that she was unsure of her identification because McNeil's hairstyle was different than Martin remembered. In view of this evidence, the jury reasonably could have discounted Rodriguez's failure to identify McNeil in court, and concluded that McNeil was present during the presentation by Hendricks.

McNeil's contention that her minimal participation was insufficient to constitute fraud is similarly unpersuasive. Hendericks misrepresented himself to Rodriguez as a postal employee and misrepresented the insurance he was selling as an individual retirement account. Although present, McNeil did not inform Rodriguez that Hendricks was not a postal employee or that the product was an insurance policy instead of an individual retirement account. McNeil's deliberate concealment of these facts is sufficient to constitute fraud; she need not have made any affirmative factual misrepresentations. *See* United States v. O'Malley, 707 F.2d 1240, 1247 (11th Cir. 1983); *Blachly*, 380 F.2d at 673-74.

The evidence indicating that McNeil was present when Hendricks made the sales presentation to Rodriguez, combined with the other evidence of McNeil's participation in the overall scheme, is also sufficient to support a determination by the jury that McNeil signed the insurance application. Furthermore, an insurance commission check was issued to McNeil for the Rodriguez policy. Hendricks testified that he cashed McNeil's checks and paid her from the proceeds. In summary, we find substantial evidence to support the jury's verdict against McNeil on the Rodriguez count.

IV

McNeil also challenges her convictions by contending that she was not present at the scheme's inception and that she was merely an employee of Hendricks. She followed Hendricks's instructions in making sales presentations, and had no role in developing the content of the sales presentations. Moreover, McNeil maintains that she did not use the mail.

McNeil's absence during the formation of the scheme, her status as Hendricks's employee, and her role in the development of the sales presentations are irrelevant. The evidence was sufficient to support the jury's finding that McNeil knowingly participated in the fraudulent scheme. The government was not required to show that she orchestrated it. Regardless of her absence at the scheme's inception, her participation at a later point is sufficient to support the convictions. *See* United States v. Toney, 598 F.2d 1349, 1356 (5th Cir. 1979), *cert. denied*, 444 U.S. 1033, 100 S.Ct. 706 (1980).

McNeil's argument that she did not use the mail is also without merit. The government must show only that the mail was used in furtherance of the scheme. *Id.* at 1355. Old American Insurance Company issued commission checks to Hendricks and McNeil for each policy they sold. The checks were mailed to Hendericks. Hendricks endorsed the checks and paid McNeil. Old American also mailed the policies to Hendricks. These facts are sufficient to show that the defendants caused the mail to be used in furtherance of the scheme.

V

McNeil and Hendricks contend that the purchasers failed to exercise ordinary care, and that the purchasers' failure to do so prevented them from understanding that they were purchasing life insurance policies. The purchasers failed to read the application forms they signed. At trial, the government stipulated that if a reasonable person exercising ordinary care had read the application forms, he would have known he was purchasing insurance.

McNeil and Hendricks rely on United States v. Louderman, 576 F.2d 1383, 1388 (9th Cir.), *cert. denied*, 439 U.S. 896, 99 S.Ct. 257 (1978). There, the Ninth Circuit held that to prove a violation of section 1341, the government must show that the misrepresentations made in furtherance of the scheme could mislead a person of ordinary prudence and comprehension. *See also* Silverman v. United States, 213 F.2d 405 (5th Cir.), *cert. denied*, 348 U.S. 828, 75 S.Ct. 46 (1954). McNeil and Hendricks assert that if those they duped had read the application forms, they would not have been defrauded. The government's stipulation establishes that this is so, but that is not this case. The misrepresentations of McNeil and Hendricks caused the purchasers not to read the forms. The part of the scheme that called for McNeil and Hendricks to represent themselves as fellow employees or union representatives was calculated to instill false confidence in their representations. The part of the scheme by which the defendants represented that the life insurance policies were individual retirement accounts or concealed that they were not, coupled with the failure to leave copies of the application forms and the nondelivery of the policies, was designed to mislead their victims into accepting the insurance application forms for what they were not.

The government was not required to prove that the misrepresentations actually misled a reasonable person. The government only had to show that the probable effect of the misrepresentations was to mislead these purchasers.

> If a chance to defraud has been or is intended to be devised, it makes no difference whether the persons the schemers intended to defraud are gullible or skeptical, dull or bright. These are criminal statutes, not tort concepts. The only issue is whether there is a plan, scheme or artifice intended to defraud. We discern no intention on the part of Congress to differentiate between schemes that will ensnare the ordinary prudent investor and those that attract only those with lesser mental acuity.

United States v. Brien, 617 F.2d 299, 311 (1st Cir.), *cert. denied*, 446 U.S. 919, 100 S.Ct. 1854 (1980). *See also* United States v. Kreimer, 609 F.2d 126, 132 (5th Cir. 1980).

The evidence was sufficient to show that McNeil and Hendricks participated in a scheme that was calculated to defraud these purchasers. The jury's verdict is supported by substantial evidence. Accordingly, the convictions are

AFFIRMED.

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1521

JOHN HENRY HENDRICKS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the evidence was insufficient to sustain his mail fraud conviction.

After a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted on four counts of mail fraud, in violation of 18 U.S.C. 1341 (Counts 1, 6, 11, and 14). He was sentenced to concurrent terms of two years' imprisonment on Counts 1, 11 and 14 and to a consecutive term of one year's imprisonment on Count 6. He was also fined $1,000 on each count. The court of appeals affirmed (Pet. App. A1-A7).

1. The evidence at trial is summarized in the opinion of the court of appeals (Pet. App. A2-A4). In brief, it showed that petitioner and co-defendant Bobbie Faye McNeil, licensed insurance agents, sold life insurance policies to postal workers who were led to believe that they were purchasing individual retirement accounts (IRAs),

savings, or retirement programs rather than life insurance.[1] The purchasers bought the policies without reading the application and payroll deduction forms that they signed after petitioner and McNeil falsely represented themselves as postal employees or postal union representatives. The purchasers were not given any copies of the forms they had signed. Petitioner and McNeil received a commission from the insurance company for each policy sold, although the purchasers cancelled the policies after they discovered what they had purchased.

2. Petitioner contends that the evidence was insufficient to sustain his convictions on multiple counts of mail fraud. The court below properly rejected this contention.

a. Petitioner claims (Pet. 5-6) that the proof as to Count 11 was inadequate because the victim of the transaction charged in that count, Jacqueline Swanson, did not testify. The offense under 18 U.S.C. 1341 requires only that the government prove the existence of a scheme to defraud and the use of the mails for the purpose of executing the scheme. *Pereira* v. *United States*, 347 U.S. 1, 8 (1954). As the court below concluded, proof of a scheme to defraud does not require a showing that the misrepresentation actually misled anyone, so long as the probable effect was to mislead the victim. The government does not have to prove reliance by the victim or that the misrepresentations misled the victim. See *United States* v. *Ranney*, 719 F. 2d 1183, 1188 (lst Cir. 1983). Accordingly, the government need not call the person alleged to have been victimized in a particular count, if its proof is otherwise adequate to permit the jury to find fraud with respect to the count as part of a general

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[1]Petitioner led one purchaser to believe that the forms he signed were simply to discover how much money he had contributed to his Social Security account (Pet. App. A2).

scheme to defraud.[2] *United States* v. *Iaciofano*, 734 F.2d 87, 90 (1st Cir. 1984). It was therefore immaterial that Swanson did not testify. The government presented sufficient evidence on this count when her husband testified that he was present when co-defendant McNeil made the same false representations about IRAs to her that petitioner had previously made to him.

b. Nor was the evidence deficient, as petitioner claims (Pet. 6-7), because the government stipulated at trial that a reasonable person exercising ordinary care would have known, had he read the application forms, that he was purchasing insurance. It is clear that the scheme depended on the likelihood that many postal workers approached by a person representing himself to be a fellow employee or union representative would not read the applications.[3] Significantly, petitioner and his co-defendant did not give any copies of the signed forms to the purchasers. In any event, as the court below said, quoting from *United States* v. *Brien*, 617 F.2d 299, 311 (1st Cir.), cert. denied, 446 U.S. 919 (1980): "If a scheme to defraud has been or is intended to be devised, it makes no difference whether the persons the schemers intended to defraud are gullible or skeptical, dull or bright * * *. The only issue is whether there is a plan, scheme, or artifice intended to defraud. We discern no intention on the part of Congress to differentiate between schemes that will ensnare the ordinary prudent investor and those that attract only those with lesser mental acuity." See also *Lemon* v. *United States*, 278 F.2d 369, 379 (9th

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[2]If the rule were otherwise, frauds against persons who are deceased at the time of trial could not be prosecuted.

[3]There is no reason to assume, as petitioner does, that the purchasers were not persons of ordinary prudence. While we submit that a victim's gullibility is no defense, it would at most be an issue to be presented in a jury instruction.

Cir. 1960); *United States* v. *Sylvanus*, 192 F.2d 96, 105 (7th Cir. 1951), cert. denied, 342 U.S. 943 (1952); *United States* v. *Kreimer*, 609 F.2d 126, 132 (5th Cir. 1980).[4]

Finally, this case does not conflict with *United States* v. *Regent Office Supply Co.*, 421 F.2d 1174 (2d Cir. 1970), as petitioner asserts. The court there ruled that the solicitation of a purchase by means of false representations not directed to the quality, adequacy, or price of goods to be sold, or otherwise to the nature of the purchase itself, did not constitute a scheme to defraud within the prohibition of 18 U.S.C. 1341.[5] Here the misrepresentation related to the very nature of the purchase: the assertion that the postal worker was buying an IRA or a savings or retirement program, rather than insurance.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

MAY 1985

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[4]Petitioner incorrectly claims (Pet. 6) that *United States* v. *Louderman*, 576 F.2d 1383, 1388 (9th Cir.), cert. denied, 439 U.S. 896 (1978), requires a showing that the scheme would mislead a person of ordinary prudence. Neither that case nor *United States* v. *Mandel*, 415 F. Supp. 997, 1006 (D. Md. 1976), upon which the *Louderman* court relies, involved any claim that the schemes there involved would not have misled persons of ordinary prudence. See also *Silverman* v. *United States*, 213 F.2d 405 (5th Cir.), cert. denied, 348 U.S. 828 (1954).

[5]The salesmen there either misrepresented that they had been referred to the customer by a mutual friend or that they were trying to dispose of goods of a deceased friend of the salesman. The court emphasized that under the facts before it "the customer gets exactly what he expected." 421 F.2d at 1180.